United States Court of Appeals

for the Second Circuit

APPENDIX

75-4221

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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ATINUAEL COLATO, :

Petitioner, :

v. : DOCKET NO. 75-4221

IMMIGRATION AND NATURALIZATION SERVICE, :

Respondent. :

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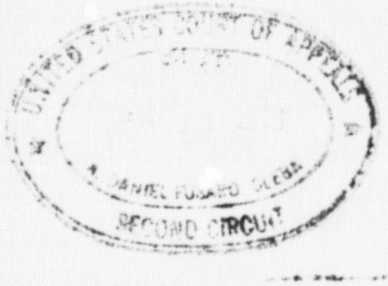
A P P E N D I X



ROSENBERG, ROSENBERG & ROCKMAN
ATTORNEYS AND COUNSELLORS AT LAW
200 GARDEN CITY PLAZA
GARDEN CITY, N.Y. 11530

(516) 248-4300

PAGINATION AS IN ORIGINAL COPY

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

ATINUAEL COLATO,

Petitioner,

v. DOCKET NO. 75-4221

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

A P P E N D I X

APPENDIX

1. Petition For Review.
2. Certificate of Marriage.
3. Decision of District Director dated March 24, 1975.
4. Decision of Board of Immigration Appeals on September 15, 1975.
5. Copy of Bark case supra annexed to the Petition in the Court of Appeals.
6. Original Petition and supporting papers.
7. Such other papers as are submitted by the Immigration and Naturalization Services which are in Respondent's possession.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

In the Matter of the Petition of ATINUAEL COLATO, as beneficiary of a visa petition filed by HERMINIA VELEZ de COLATO, Petitioner.	File No: A20 110 038 PETITION FOR REVIEW PURSUANT TO RULE 15 OF THE FEDERAL RULES OF APPELLATE PROCEDURE

TO THE JUSTICES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT:

This is the Petition of the beneficiary for a review of the determination of the United States Department of Justice , Board of Immigration Appeals affirmance, dated September 15, 1970 on an appeal from a decision dated March 24, 1975 determining that the beneficiary (Atinuael Colato) is entitled to no status based on the wife's petition that he be granted immediate relative status under the Immigration and Nationality Act.

That annexed hereto and made a part hereof are: (1) a copy of the marriage lisence of Herminia Velez de Colato; (2) a copy of the decision of the Immigration and Naturalization Service dated March 24, 1975; (3) a copy of the case cited in support of the appeal to the Board of Immigration Appeals, to wit: Bark v. INS, 511 FLR 2273, 511 F.2d 1200 (9 Cir. 1975); (4) Decision of the Board of Immigration Appeals dismissing the appeal apparently distinguishing Bark, supra.

LAW OFFICES
OSENBERG, ROSENBERG
AND ROCKMAN

That it is respectfully submitted that based upon the enclosed documents which appear to constitute substantially the record in this matter at the very least the Board of Immigration Appeals should have remanded this matter for a further hearing rather than acting in Bark, supra, and out-of-hand denying the applicant change of status. That oral argument is respectfully requested in this matter.

Yours, etc.,

Dated: Garden City, N.Y.
October 6, 1975

ROSENBERG, ROSENBERG & ROCKMAN

By: _____
GEORGE ROCKMAN, a member of the firm
200 Garden City Plaza
Garden City, New York 11530
(516) 248-4300

LAW OFFICES
ENBERG, ROSENBERG
AND ROCKMAN

Town of North Hempstead

Record No. 572 of Year 1973

County of Nassau — State of New York

MICHAEL J. TULLY, JR.
Supervisor

WILLIAM H. RYAN, JR.
Town Clerk

Certificate of Marriage

This is to Certify

that	ATINUAEL COLATO	residing at	ROSLYN, NEW YORK
who was born	OCTOBER 12th, 1928	at	GUATA JIAGUA, EL SALVADOR
and	HERMINIA VELEZ	residing at	MINEOLA, NEW YORK
who was born	DECEMBER 6th, 1945	at	UTAUDO, PUERTO RICO
were married on	JUNE 9th, 1973	at	MINEOLA, NEW YORK

As shown by the duly registered license and certificate of marriage of said persons on file in this office.

Dated at Manhasset, N. Y.

JUNE 14th, 1973

Raymond L. Clark
Deputy Town Clerk

Any Alteration Invalidates This Certificate

Issued Pursuant to Section 14-a, Domestic Relations Law

TC DH 1-1/2M 1/

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
20 West Broadway
New York, N.Y. 10007

REFER TO THIS FILE NO.
A20 110 038

Herminia Velez de Colato
202 Jericho Turnpike
Mineola, N.Y. 11501

Date: MAR 2 4 1978

DECISION

Upon consideration, it is ordered that your visa petition filed in behalf of Atinuael Colato be denied for the following reasons:

See attached

If you desire to appeal this decision, you may do so. Your notice of appeal must be filed within 15 days from the date of this notice. If no appeal is filed within the time allowed, this decision is final. Appeal in your case may be made to:

[x] Board of Immigration Appeals in Washington, D. C., on the enclosed Forms I-290 A.

[ ] Regional Commissioner on the enclosed Form I-290 B.

If an appeal is desired, the Notice of Appeal shall be executed and filed with this office, together with a fee of $25. A brief or other written statement in support of your appeal may be submitted with the Notice of Appeal.

Any question which you may have will be answered by the local immigration office nearest your residence, or at the address shown in the heading to this letter.

ORIG: Rosenberg, Rosenberg & Rochman
114 Old Country Road
Mineola, N.Y. 11501
Enclosure(s)

Sincerely yours,
Maurice J. Tiley
District Director

Form I-292
(Rev. 2-1-72)Y

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Section 201(b) of the Immigration and Nationality Act provides for the granting of immediate relatives status to the spouses of citizens of the United States. The beneficiary is ineligible for the status sought under Section 201(b) of the Act.

As the petitioner, you appeared at this office on November 16, 1973 accompanied by the beneficiary to be interviewed in connection with matters concerning the visa petition, specifically to establish the bona fides and validity of your marriage under immigration law.

Statements made under oath by you and the beneficiary revealed serious discrepancies and contradictions. As these could not be resolved, it was deemed advisable to refer the matter for further investigation. You were requested to appear for interview on November 21, and December 4, 1973; January 7, 1974 and January 25, 1974, but failed to do so. Therefore, on February 22, 1974 the visa petition was denied for lack of prosecution.

A motion to reopen the proceedings was filed on April 22, 1974 and on that basis you were requested to appear for interview on November 27, 1974, December 23, 1974, January 28, 1975 and February 11, 1975.

On February 11, 1975 you stated, under oath, that the beneficiary does not live with you; that the beneficiary lived with you for a while after your marriage on June 9, 1973; and that the beneficiary moved out of your home in December 1973, and has not lived with you since. You do not know where the beneficiary is presently living and you could not say whether you and the beneficiary expect to live together in the future.

In view of the foregoing, it is considered that the beneficiary is not entitled to any status based on your petition.

74-133

United States Department of Justice

Board of Immigration Appeals

Washington, D.C. 20530

File: A20 110 038 - New York SEP 15 1975

In re: ATHANAEL COLATO, Beneficiary of visa petition filed by HERMINIA VELEZ DE COLATO, Petitioner

IN VISA PETITION PROCEEDINGS

APPEAL

ON BEHALF OF PETITIONER: Rosenberg, Rosenberg & Rockman
200 Garden City Plaza
Garden City, New York 11530

APPLICATION: Petition to classify status of alien relative for issuance of immigrant visa

This is an appeal from the District Director's denial on March 24, 1975 of a visa petition filed to accord the beneficiary the status of immediate relative, pursuant to 201(b) of the Immigration and Nationality Act, as the spouse of a United States citizen. The appeal will be dismissed.

The petitioner is a native and citizen of the United States. The beneficiary, 46 years of age, is a native of El Salvador. The record reveals that when the couple were first interviewed, during November 1973, there were serious discrepancies in their statements. When they were again interviewed (February 1975) the petitioner stated that they had separated during December of 1973.

On appeal the petitioner claims that the denial of the petition, solely because of the admitted separation, was contrary to Bark v. INS, 511 F.2d 1200 (9 Cir. 1975). We disagree with the petitioner's premise that denial was solely because of the admitted separation. From the record before

us we conclude that the petitioner has not established that she ever lived with the beneficiary.

In visa petition proceedings, the burden is on the petitioner to establish eligibility, Matter of Brantigan, 11 I&N Dec. 493, 495 (BIA 1966). A marriage entered into for the purpose of evading the immigration laws is not entitled to recognition for the purpose of receiving immigration benefits, Lutwak v. United States, 344 U.S. 604, 611 (1953). The Supreme Court there stated:

> The common understanding of a marriage, which Congress must have had in mind. . .is that the two parties have undertaken to establish a life together and assume certain duties and obligations.

The fact that there were sizeable discrepancies in the statements of petitioner and beneficiary during November 1973, at a time when they were allegedly living together, gives rise to a question as to their credibility that they ever lived together. In view of those discrepancies, we find not credible their statements that they lived together following their marriage. Their marriage does not appear to be one undertaken to establish a life together.

ORDER: The appeal is dismissed.

Chairman

the Western District of North Carolina, Wilson Warlick, Senior District Judge, presented question whether a warrantless search of the trunk of defendant's motor vehicle which produced a firearm used as a basis for prosecution for illegal possession of an unregistered automatic rifle violated defendant's Fourth Amendment rights. The Court of Appeals held that where firearms were discovered by the operator of a wrecking service, who had been entrusted with possession of defendant's automobile, upon opening trunk of vehicle without any instructions from police and where wrecking service operator summoned police to examine firearms upon discovering them in trunk, warrantless seizure of firearms by police was permissible under plain view doctrine.

Affirmed.

Searches and Seizures ⇐3.3(4)

Where firearms were discovered by the operator of a wrecking service, who had been entrusted with possession of defendant's automobile, upon opening trunk of vehicle without any instructions from police and where wrecking service operator summoned police to examine firearms upon discovering them in trunk, warrantless seizure of firearms by police was permissible under plain view doctrine. 26 U.S.C.A. (I.R.C.1954) §§ 5861(d), 5871.

Martin L. Brackett, Jr., Charlotte, N. C. (Allen A. Bailey, Charlotte, N. C., [Court-appointed counsel], on brief), for appellant.

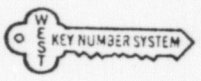
Michael S. Scofield, Asst. U. S. Atty. (Keith S. Snyder, U. S. Atty., on brief), for appellee.

Before WINTER, CRAVEN and WIDENER, Circuit Judges.

PER CURIAM:

After examining the record and briefs and hearing oral argument, we see no merit in this appeal. The principal point urged is that defendant's fourth amendment rights were violated when the police made a warrantless seizure of two firearms in the trunk of defendant's motor vehicle, and one of the firearms was used as the basis for the prosecution for illegal possession of an unregistered automatic rifle in violation of 26 U.S.C. §§ 5861(d) and 5871. The firearms were seized when the operator of a wrecking service, to whom possession of defendant's car had been entrusted, opened the trunk, concededly not under instructions by the police, observed the firearms and summoned the police to examine them.* We are persuaded that a warrantless seizure was permissible under the plain view doctrine. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

Affirmed.



Sang Chul BARK, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

No. 72-3143.

United States Court of Appeals, Ninth Circuit.

Feb. 5, 1975.

A native Korean sought review of a determination by the Board of Immigration Appeals that he was ineligible for adjustment of status from student visitor to permanent resident because the marriage upon which he based his application was a sham. The Court of Appeals, Hufstedler, Circuit Judge, held

* These facts distinguish the instant case from Cash v. Williams, 455 F.2d 1227 (6 Cir. 1972), on which defendant places heavy reliance. In *Cash*, the police officers participated in the warrantless search.

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at it had been error to base the deter-
ination solely on the fact that petition-
and his wife had separated.

Reversed and remanded.

liens ⇐53.10(2)

Denial of adjustment of status of orean alien from student visitor to per-anent resident on ground that alien's arriage to resident Korean alien was am was error where inquiry turned ly on duration of parties' separation d where determination may have been fluenced by irrelevant fact that wife uld and did leave as she pleased when uple was together. Immigration and ationality Act, §§ 203(a)(2), 204, 245, 8 S.C.A. §§ 1153(a)(2), 1154, 1255.

Donald L. Ungar of Phelan, Simmons Ungar, San Francisco, Cal., for peti-oner.

James L. Browning, Jr., U. S. Atty., illiam B. Spohn, Asst. U. S. Atty., hief, Civil Div., Bernard J. Hornbach, p. Asst. U. S. Atty., for respondent.

Before MERRILL, HUFSTEDLER, d CHOY, Circuit Judges

OPINION

HUFSTEDLER, Circuit Judge:

Petitioner was denied adjustment of atus from student visitor to permanent sident, pursuant to section 245 of the mmigration and Nationality Act ("the ct") (8 U.S.C. § 1255), and he seeks view. Respondent has conceded that e denial was based solely on the Immi-ation Judge's conclusion, affirmed by e Board of Immigration Appeals, that etitioner was ineligible for adjustment status because the marriage upon hich he based his application was a am.

Petitioner and his wife had been veethearts for several years while they ere living in their native Korea. She mmigrated to the United States and be-me a resident alien. Petitioner came the United States in August, 1968, initially as a business visitor and then as a student. They renewed their acquaintance and were married in Hawaii in May 1969. Petitioner's wife filed a petition on his behalf to qualify him for status as the spouse of a resident alien pursuant to sections 203(a)(2) and 204 of the Act (8 U.S.C. §§ 1153(a)(2), 1154). Petitioner thereafter filed his own application for adjustment of status under section 245 of the Act.

Petitioner and his wife testified at the hearing on his application that they married for love and not for the purpose of circumventing the immigration laws; they admitted quarreling and separating. Their testimony about the time and extent of their separation was impeached by evidence introduced by the Service. The Immigration Judge discredited their testimony and held that the marriage was a sham, relying primarily (perhaps solely), on the evidence of their separation. In affirming the Immigration Judge's decision, the Board of Immigration Appeals stated: "Investigation revealed that [petitioner] and his wife lived in separate quarters. While both testified that their marriage was 'a good marriage,' their testimony as to how much time they actually spent together was conflicting."

Petitioner's marriage was a sham if the bride and groom did not intend to establish a life together at the time they were married. The concept of establishing a life as marital partners contains no federal dictate about the kind of life that the partners may choose to lead. Any attempt to regulate their life styles, such as prescribing the amount of time they must spend together, or designating the manner in which either partner elects to spend his or her time, in the guise of specifying the requirements of a bona fide marriage would raise serious constitutional questions. (*Cf.* Roe v. Wade (1973) 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147; Graham v. Richardson (1971) 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534; Griswold v. Connecticut (1965) 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510.) Aliens cannot be required

to have more conventional or more successful marriages than citizens.

Conduct of the parties after marriage is relevant only to the extent that it bears upon their subjective state of mind at the time they were married. (Lutwak v. United States (1953) 344 U.S. 604, 73 S.Ct. 481, 97 L.Ed. 593.) Evidence that the parties separated after their wedding is relevant in ascertaining whether they intended to establish a life together when they exchanged marriage vows. But evidence of separation, standing alone, cannot support a finding that a marriage was not bona fide when it was entered. The inference that the parties never intended a bona fide marriage from proof of separation is arbitrary unless we are reasonably assured that it is more probable than not that couples who separate after marriage never intended to live together. (*Cf.* Leary v. United States (1969) 395 U.S. 6, 36, 89 S.Ct. 1532, 23 L.Ed.2d 57.) Common experience is directly to the contrary. Couples separate, temporarily and permanently, for all kinds of reasons that have nothing to do with any preconceived intent not to share their lives, such as calls to military service, educational needs, employment opportunities, illness, poverty, and domestic difficulties. Of course, the time and extent of separation, combined with other facts and circumstances, can and have adequately supported the conclusion that a marriage was not bona fide.[1]

The administrative record discloses that the Immigration Judge and Board of the Immigration Appeals did not focus their attention on the key issue: Did the petitioner and his wife intend to establish a life together at the time of their marriage? The inquiry, instead, turned on the duration of their separation, which, as we have pointed out, is relevant to, but not dispositive of the intent issue. Moreover, the determination may have been influenced by the irrelevant fact, cited by respondent to support the Service, that "the wife could and did leave as she pleased when they were together." The bona fides of a marriage do not and cannot rest on either marital partner's choice about his or her mobility after marriage.

We decline to speculate about the conclusion that would have been reached if the Service had confined itself to evidence relevant to the parties' intent at the time of their marriage. The Service will have an opportunity on remand to develop the record in accordance with the views herein expressed.

Reversed and remanded.

1. *E. g.*, Lutwak v. United States, *supra*, 344 U.S. 604, 73 S.Ct. 481, L.Ed. 593, which involved criminal prosecutions stemming from an elaborate scheme to secure entry into the United States for two brothers and the former wife of one of them under the "War Brides Act." Female veterans were hired to marry the brothers, and the brothers' nephew (also a veteran) married the former wife. The parties agreed beforehand to separate as soon as possible, and none of them ever cohabited.

In United States v. Sacco (9th Cir. 1970) 428 F.2d 264 the defendant claimed derivative citizenship based on his mother's marriage to a citizen. His mother's marriage was found a sham because she married solely to legitimate a child. She did not marry to circumvent the immigration laws, but the evidence was clear that she and her husband never intended to live together after marriage.

Other cases holding the marriages sham disclose circumstances almost as unusual as *Lutwak*. (*E. g.*, Johl v. United States (9th Cir. 1966) 370 F.2d 174; Scott v. INS (2d Cir. 1965) 350 F.2d 279, rev'd on another point sub nom. INS v. Errico (1966) 385 U.S. 214, 87 S.Ct. 473, 17 L.Ed.2d 318; United States v. Pantelopoulos (2d Cir. 1964) 336 F.2d 421; United States v. Abdel-Khaleq (7th Cir. 1965) 354 F.2d 642; *cf.* Espinoza Ojeda v. INS (9th Cir. 1969) 419 F.2d 183.)

FOR IMMIGRANT VISA

DO NOT WRITE IN THIS SPACE

The petition was filed on _____ (Date) at _____ (Place)

The petition is approved for status under section:

☐ 201 (b) SPOUSE CHILD ☐ 201 (b) (2)

☐ 201 (b) PARENT ☐ 203 (a) (4)

☐ 203 (a) (1) ☐ 203 (a) (5)

DATE OF ACTION

CD

DISTRICT

(PETITIONER IS NOT TO WRITE ABOVE THIS LINE)

1. Petition is hereby made to classify the status of the alien beneficiary for issuance of an immigrant visa as: (Check one)

☒ The spouse, child (regardless of age), parent, brother or sister of a United States citizen.

☐ The spouse or unmarried child (regardless of age) of an alien lawfully admitted to the United States for permanent residence.

Block 1. – Information About Alien Beneficiary

2. Name (Last, in CAPS) (First) (Middle) COBATO ATINUAEL	3. Do Not Write in This Space	4. Relationship of beneficiary to petitioner brother
5. Other names used; (including maiden name if married woman)		6. Are beneficiary and petitioner related by adoption? no
7. Place of birth (Country) El Salvador	8. Date of birth (Month, day, year) 10 12 28	9. Beneficiary's marital status: ☐ Married ☐ Widowed ☐ Divorced ☒ Single
10. *Petitioner's* name (Last, in CAPS) (First) (Middle) COBATO HERMINIA	11. *Petitioner's* phone	12. Has this beneficiary ever been in the U.S.? ☐ Yes ☐ No

13. Name of beneficiary's spouse, if married, and date and country of birth (Omit this item if petition is for your spouse)

14. Names, birthdates and countries of birth of beneficiary's children, if any

15. Full address of beneficiary's spouse and children, if any (Omit this item if petition is for your spouse)

16. If this petition is for your spouse or child, give the following:

a. Date and place of your present marriage

b. Number of your previous marriages

c. Number of your spouse's previous marriages

d. Last previous marriage of you or your spouse ended by

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Block II — Information About Petitioner

25. My name is (Last) Colate	(First) Herminia	(Middle)	26. Other names used: (including maiden name if married woman) Velez
27. I reside in the United States at (Apt No)	(Number and street) 203 Jericho Tpke	(Town or City) Mineola	(State) Ny (ZIP Code)
28. Address abroad (if any) (Number and street)	(City or town)	(Province)	(Country)
29. I was born: (Month) (Day) (Year) ... D 6 45	In: (City or town) Utuado	(State or Province) Puerto Rico	(Country)

30. If you are a citizen of the United States, give the following:

a. Citizenship was acquired. (Check one) ☒ through birth in the U.S. ☐ through parents ☐ through naturalization ☐ through marriage

(1) If acquired through naturalization, give name under which naturalized, number of naturalization certificate, and date and place of naturalization:

(2) If acquired through parentage or marriage, have you obtained a certificate of citizenship in your own name based on such acquisition?

(a) If so, give number of certificate and date and place of issuance

... in accordance with Instruction 3a(2)

... United States citizenship? NA

... give the following:

... Date, place, and means of admission for lawful permanent residence

If so, explain

... read instruction 13 carefully

... Yes

Block III — Oath or Affirmation of Petitioner

I ... know the contents of this petition signed by me and that the statements herein are true and correct.

Signature of petitioner (See Instruction No. 8) Herminia Colate

Subscribed and sworn (affirmed) before me this ______ day of ______ A.D. 19____, at ______

(SEAL) My commission expires ______ (SIGNATURE OF OFFICER ADMINISTERING OATH) (TITLE)

Block IV. — Signature of Person Preparing Form, If Other Than Petitioner

I declare that this document was prepared by me at the request of the petitioner and is based on all information of which I have any knowledge.

(SIGNATURE) (ADDRESS) (DATE)